



Paper No. 22

Brian W. Bockhop
ARNALL GOLDEN GREGORY LLP
1201 WEST PEACHTREE STREET
ATLANTA, GA 30309-3450

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In re Application of
Heinrich et al.
Application No. 09/329,557
Filed: June 10, 1999
Attorney Docket Number: TDA-23

**OFFICE OF PETITIONS
ON PETITION**

This is a decision on the petition filed March 17, 2003 under 37 CFR 1.137(a).

The petition to revive under 37 C.F.R. § 1.137(a) is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 C.F.R. § 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 C.F.R. § 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This application became abandoned for failure to timely submit the issue fee, as required by the Notice of Allowance and Issue Fee Due and to submit corrected drawings as was required of the Notice of Allowability both of which were mailed October 23, 2002 and set a three month statutory period for reply. Extensions of time pursuant to 37 CFR 1.136(a) were not available. Accordingly, this application became abandoned on January 24, 2003. A Notice of Abandonment was mailed on March 3, 2003.

Applicant contends the failure to pay the issue fee by the due date was unavoidable because the Examiner failed to acknowledge two timely submitted IDS' and the Patent Office failed to respond to a status Inquiry submitted on December 13, 2002.

PETITION TO REVIVE UNDER 37 CFR 1.137(a)

A grantable petition under 37 C.F.R. § 1.137(a) must be accompanied by:

- (1) the required reply,¹
- (2) the petition fee,
- (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

The instant petition lacks items (1) and (3).

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

As to item (1) although petitioner submitted \$1280.00 towards the issue fee, the current issue fee pursuant to 37 CFR 1.18 (a) is \$1300.00 thus petitioner is short \$20.00. In addition, the Notice of Allowability required formal corrected drawings. A review of the Office record shows that corrected drawings have not been received.

The Office may revive an abandoned application if the delay in responding to the relevant outstanding office requirement is shown to the satisfaction of the Commissioner to have been "unavoidable." See, 37 C.F.R. § 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" is applicable to ordinary human affairs, and requires no more greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business."); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case by case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2D 1130 (N.D. Ind. 1987).

As to item (3), petitioner's arguments have been considered but the fail to establish unavoidable delay within the meaning of 37 CFR 1.137(a). The Commissioner has no authority to extend the time for paying the issue fee. Intentional failure to pay the issue fee within the 3 months permitted by 35 U.S.C. 151 does not amount to unavoidable or unintentional delay in making payment. See MPEP 1306. As petitioner indicated in the petition, "Applicant was faced with two choices: petition to withdraw the application under 37 CFR §1.131 or have the application go abandoned until the IDS issue [could] be resolved". Accordingly, petitioner was aware of what the consequences were in failing to pay the issue fee and opted to allow the application to go abandoned.

Further correspondence with respect to this matter should be addressed as follows:

By mail:	Mail Stop Petition Commissioner for Patents P.O. Box 1450 Alexandria, VA 22313-1450
By facsimile:	(703) 308-6916
By hand:	Office of Petitions 2201 South Clark Place Crystal Plaza 4, Suite 3C23 Arlington, VA 22202
By delivery service: (FedEx, UPS, DHL, etc.)	U.S. Patent and Trademark Office 2011 South Clark Place Customer Window, Mail Stop Petition Crystal Plaza Two, Lobby, Room 1B03 Arlington, VA 22202

Telephone inquiries should be directed to the undersigned at (703) 306-0251.

A handwritten signature in cursive script, appearing to read "Charlema R. Grant".

Charlema R. Grant
Petitions Attorney
Office of Petitions